2004

UTAH COUNTY and STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES v. RANDY BUTLER, DONNA BUTLER, MARGARET CONDLEY, MICHAEL E. CONDLEY, ELIZABETH CONDLEY. BLAINE EVANS, LINDA EVANS AND JOHN DOES 1 through 15 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

UTAH COUNTY and STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES, Plaintiffs/Appellees/Cross Appellant **vs.** RANDY BUTLER, DONNA BUTLER, MARGARET CONDLEY, MICHAEL E. CONDLEY, ELIZABETH CONDLEY, BLAINE EVANS, LINDA EVANS AND JOHN DOES 1 through 15, Defendants/Appellants/Cross Appellees	Case No. 20040809-CA

Reply Brief of Cross Appellant Utah County

Appeal/Cross Appeal from the Findings of Facts Conclusions of Law, and Order of the Honorable James R. Taylor in the Fourth District Court, Utah County, State of Utah, entered August 16, 2004 in Case No. 00403372.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER

SUMMARY OF ARGUMENT

This cross-appeal is a review of the trial court's decision denying Utah County's request to recover $10 for each day the gate installed by Butlers across the Bennie Creek Road remained within the right-of-way after notice was complete, pursuant to Utah Code Ann. § 72-7-104(4)(b). The trial court erred for the following reasons: (1) because the trial court incorrectly considered whether the gate was locked or unlocked, rather than consider the gate, itself as an "installation" in violation of Utah Code Ann. § 72-7-104(4)(b); and (2) that even if the trial court properly considered whether the gate was locked or unlocked, the evidence at trial shows the gate was locked, or in the alternative demonstrates with reasonable precision how many days the gate was locked.

In response Cross Appellees contend the following: (1) that Utah County failed to preserve the first issue, namely that the trial court incorrectly considered whether the gate was locked or unlocked, rather than consider the gate, as an "installation" in violation of Utah Code Ann. § 72-7-104(4)(b); and (2) that Utah County failed to marshal the evidence with respect to whether the evidence at trial shows the gate was locked or in the alternative demonstrates with reasonable precision how many days the gate was locked.

Utah County preserved the issue of whether the trial court incorrectly considered whether the gate was locked or unlocked, rather than consider the gate as an "installation" in violation of Utah Code Ann. § 72-7-104(4)(b). Preservation of the issue came by Utah County's discussion in the trial brief, the Notices served on the Butlers (Plaintiffs'

Exhibits 73 and 74), the testimony of at least 23 witnesses, the admissions of Mr. Butler, and the detailed discussion during closing argument. However, even if the issue was not preserved, the trial court ruled on grounds not raised at trial which are therefore automatically preserved for appeal.

Utah County has also properly marshaled the evidence. Cross Appellees have failed to point to any evidence that Utah County allegedly failed to marshal. Glaringly absent from Cross Appellees' brief is any discussion of the evidence that Utah County did not marshal. Utah County has sufficiently marshaled the evidence and Cross Appellees have failed to address that evidence. Cross Appellees' failure to address the evidence, demonstrates that Cross Appellees have no legal basis to dispute that the trial court incorrectly determined against the weight of evidence that it could not determine with reasonable precision the number of days that the gate was locked in violation of Utah Code Ann. § 72-7-104(4)(b).

Therefore, the Appellate Court should reverse the decision of the trial court and Utah County should be granted judgment in the amount of $10 for each day the gate remained within the right-of-way after notice was complete from July 29, 1997 to August 16, 2004 [the date of the Findings of Fact, Conclusions of Law, and Order] for a total of 2,754 days and $25,740.00.

ARGUMENT

I. UTAH COUNTY PRESERVED THE ISSUE OF WHETHER THE TRIAL COURT INCORRECTLY CONSIDERED WHETHER THE GATE WAS LOCKED OR UNLOCKED, RATHER THAN CONSIDER THE GATE AS AN "INSTALLATION" IN VIOLATION OF UTAH CODE ANN. § 72-7-104(4)(B).

"As a general rule [Appellate Courts] decline to address issues raised for the first time on appeal." *Carrier v. Salt Lake City,* 2004 UT 98, ¶43, 104 P.3d 1208, 513 Utah Adv. Rep. 23; *See also Crank v. Utah Judicial Council*, 2001 UT 8, ¶43, 20 P.3d 307. "An appellate court generally will not review any issue that was not raised in the court below." *Ellis v. Swensen*, 2000 UT 101, ¶30, 16 P.3d 1233. "In sum, for an issue to be sufficiently raised, even if indirectly, it must be raised to a level of consciousness such that the trial judge can consider it." *State v. Brown*, 856 P.2d 358, 361 (Utah Ct. App. 1993); *See also Lebaron & Assocs. v. Rebel Enters.*, 823 P.2d 479, 483 (Utah Ct. App. 1991).

In this case, Utah County argued in its trial brief that "the evidence at trial will demonstrate that Plaintiff Utah County served written notices on Defendants Randy Butler and Donna Butler on July 29, 1997 to remove any and all poles, structures or objects of any kind or character placed, constructed or maintained by them within the right-of-way of the Bennie Creek Road, including, but not limited to, any gates placed thereon. As a result, Plaintiff Utah County is entitled to judgment, joint and several, against Defendants Randy Butler and Donna Butler at the rate of $10 per day, plus

interest from July 29, 1997 to the present, costs and expenses incurred for removing the gate, and costs of this lawsuit." (R. at 001432).

At trial, Utah County introduced into evidence Plaintiffs' Exhibits Nos. 73 and 74 which were Notices dated July 18, 1997, and signed by David J. Gardner, Chairman of the Utah County Board of Commissioners (hereinafter collectively referred to as "Notices"). Those Notices were served on the Butlers on July 29, 1997 and informed them that their gate was illegal and must be removed from the Road. (R. at 001645:1147 and Plaintiff's Exhibit Nos. 73 and 74.) Those Notices further informed them that if they failed to remove the gate within ten (10) days of service of the Notices, then Utah County may recover the sum of $10 for each day it remains within the right-of-way. *See Id.*

Also, at least 23 witnesses testified at trial that a gate was installed on the Road, which was often frequently locked. (R. at 001639:19-20, 31, 58, 135, 150-151, 161-162, 165, 167; 001640:203, 208-210, 218, 221, 224, 227, 237, 240, 247-248, 252, 254-255, 261, 266, 279-280, 323, 327, 379, 386-389, 401-402, 418, 421-422, 424; 001641:446-447, 462-464, 467, 478, 485, 532, 537-538, 566; 001642:691).

Randy Butler admits that prior to July 29, 1997, the Butlers erected a gate across the Road. (R. at 001645:1074-1075). Mr. Butler also admits that he and his wife, Donna Butler were served on July 29, 1997 with Notices dated July 18, 1997 and signed by David J. Gardner, Chairman of the Utah County Board of Commissioners, directing them

to remove the gate from the Road. (R. at 001645:1147 and Plaintiff's Exhibits Nos. 73 and 74). Finally, the applicability of Utah Code Ann. § 72-7-104 was discussed in detail during closing argument. (R. at 001646:1192, 1195, 1214-1220).

Utah County preserved the issue discussed in Section I herein for appeal based on its discussion in the trial brief, the Notices, the testimony of at least 23 witnesses, the admissions of Mr. Butler, and the detailed discussion during closing argument. Therefore, the Appellate Court should consider whether the trial court incorrectly considered whether the gate was locked or unlocked, rather than consider the gate as an "installation" in violation of Utah Code Ann. § 72-7-104(4)(B). Furthermore, the Appellate Court after considering that issue should reverse the decision of the trial court and Utah County should be granted judgment in the amount of $10 for each day the gate remained within the right-of-way after notice was complete from July 29, 1997 to August 16, 2004 [the date of the Findings of Fact, Conclusions of Law, and Order] for a total of 2,754 days and $25,740.00.

II. IF UTAH COUNTY FAILED PRESERVE THE ISSUE DISCUSSED IN SECTION I, THEN THE TRIAL COURT RULED ON GROUNDS NOT RAISED AT TRIAL WHICH ARE THEREFORE PRESERVED FOR APPEAL.

In addition to any issue raised at the trial court level, all issues not raised at the trial court level but ruled on by the trial judge are preserved for appeal. *See generally*

State v. Matsamas, 808 P.2d 1048, 1053 (Utah 1991); *See also Estate of Covington By and Through Covington v. Josephson*, 888 P.2d 675 (Utah App. 1994).

In this case, the trial court ruled in its *Memorandum Decision* as follows:

> There was testimony that a locked gate was constructed in 1996 by Mr. Butler. There was also substantial testimony that many people were unable to travel the road after that time without gaining permission or using a key provided by Mr. and Mrs. Butler. However, one exhibit shows a gate [sic] created by the County which allowed travel past the Butler gate, although admonishing travelers to close the gate and stay on the road until arriving at the forest service. As noted above, there have historically been gates across the road for purposes unrelated to obstruction of traffic. An unlocked gate is consistent with this pattern and would not be considered to violate the right-of-way declared today.

(R. 001459). Since the trial court ruled that an unlocked gate would not be considered to violate the right-of-way, it improperly ruled that an unlocked gate is not an installation that would violate Utah Code Ann. § 72-7-104. If Utah County failed to properly preserve this issue, then the trial court ruled on grounds not raised at trial by either party. As a result, that issue is automatically preserved for appeal.

Therefore, the Appellate Court should consider whether the trial court incorrectly considered whether the gate was locked or unlocked, rather than consider the gate as an "installation" in violation of Utah Code Ann. § 72-7-104(4)(B). Furthermore, the Appellate Court after considering that issue should reverse the decision of the trial court and Utah County should be granted judgment in the amount of $10 for each day the gate remained within the right-of-way after notice was complete from July 29, 1997 to August

16, 2004 [the date of the Findings of Fact, Conclusions of Law, and Order] for a total of 2,754 days and $25,740.00.

III. UTAH COUNTY HAS PROPERLY MARSHALED THE EVIDENCE AND CROSS APPELLEES FAILED TO SHOW ANY EVIDENCE THAT WOULD INDICATE THAT UTAH COUNTY FAILED TO PROPERLY MARSHALL THE EVIDENCE.

At the outset, Utah County acknowledged and embraced its cross appeal burden of marshaling all of the evidence both for and against the trial court's decision on the $10/day damages issue. With that in mind, Utah County marshaled every scrap of competent evidence introduced at trial which supports the very findings that it resists. *See West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah Ct. App. 1991); *See also Tingey v. Christensen*, 1999 UT 68, ¶7; 987 P.2d 588. Cross-Appellees argues that Utah County has failed to marshal the evidence. (*See Reply Brief of Appellants/Brief of Cross-Appellees*, page 17).

The Appellate Court has previously recognized that "[p]rudent appellees likely will not rely solely on an assertion that the appellant has failed to marshal the evidence; rather, appellees are compelled to perform the marshaling process to protect their position." *Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1053 (Utah App. 1994). In this case, Cross-Appellees merely assert that Utah County has failed to marshal and do not themselves perform the marshaling process nor do they point to any evidence that they allege Utah County has failed to marshal. There is no evidence

in the trial record that Utah County failed to marshal. Thus, the reason why Cross-Appellees failed to cite any evidence in their brief.

Therefore, the Appellate Court should find that Utah County properly marshaled the evidence. After considering that evidence, the Appellate Court should reverse the decision of the trial court and Utah County should be granted judgment in the amount of $10 for each day the gate remained within the right-of-way after notice was complete from July 29, 1997 to August 16, 2004 [the date of the Findings of Fact, Conclusions of Law, and Order] for a total of 2,754 days and $25,740.00.

IV. ASSUMING THAT UTAH COUNTY PROPERLY MARSHALED THE EVIDENCE, CROSS APPELLEES FAILED TO ADDRESS THE ISSUE OF WHETHER THE TRIAL COURT INCORRECTLY DETERMINED AGAINST THE WEIGHT OF EVIDENCE THAT IT COULD NOT DETERMINE WITH REASONABLE PRECISION THE NUMBER OF DAYS THAT THE GATE WAS LOCKED IN VIOLATION OF UTAH CODE ANN. § 72-7-104(4)(B).

Assuming that Utah County properly marshaled the evidence and that the issue is relevant and properly before the Appellate Court, Cross-Appellees failed to address Section VIII of Utah County's initial brief. Section VIII of Utah County's initial brief addressed whether the trial court incorrectly determined against the weight of evidence that it could not determine with reasonable precision the number of days that the gate was locked in violation of Utah Code Ann. § 72-7-104(4)(B).

"If an appellee fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the appellant's positions is correct . . . or determine that the issue has merit." 5 Am Jur. 2d. *Appellate Review*, §555; *See also Nance v. Miami Sand & Gravel, LLC.*, 825 N.E.2d 826 (Ind. Ct. App. 2005) ("appellee's failure to respond to an issue raised in an appellant's brief is, as to that issue, akin to failing to file a brief.") The failure to respond to the merits of a controversy can be considered a confession of reversible error. *See Bulova Watch Co. v. Super City Dept. Stores of Ariz., Inc.*, 4 Ariz.App. 553, 422 P.2d 184 (Ariz. Ct. App. 1967).

In Utah County's initial brief, Utah County discussed all of the evidence produced at trial, both for and against, which showed the number of days the gate was locked in violation of Utah Code Ann. § 72-7-104(4)(b). To reiterate, the evidence produced at trial was that prior to July 29, 1997, the Butlers erected a gate across the Road. (R. At 001645:1074-1075). On July 29, 1997 the Butlers were served with Notices dated July 18, 1997 and signed by David J. Gardner, Chairman of the Utah County Board of Commissioners, directing them to remove the gate from the Road. (R. At 001645:1147 and Plaintiff's Exhibit Nos. 73 and 74.)

After the aforementioned Notices were served on the Butlers, they did not remove the gate from the Road. (R. at 001645:1147). On June 14, 2004 during trial, Randy Butler was asked "After you received that letter [Notice] did you open the gate?" (R. at

001645:1147). Randy Butler responded "No. . . ." (R. at 001645:1147). Mr. Butler was then asked "Is the gate still closed today and locked?" (R. at 001645:1147). Randy responded "Yeah." (R. at 001645:1147).

At least 23 witnesses testified that Butler's gate was installed on the Road and prevented access unless they obtained permission from the Butlers (R. at 001639:19-20, 31, 58, 135, 150-151, 161-162, 165, 167; 001640:203, 208-210, 218, 221, 224, 227, 237, 240, 247-248, 252, 254-255, 261, 266, 279-280, 323, 327, 379, 386-389, 401-402, 418, 421-422, 424; 001641:446-447, 462-464, 467, 478, 485, 532, 537-538, 566; 001642:691).

During closing argument, the trial court commented that "Your client was served on the 29th of July, 1997. The road has remained obstructed from then until now. Just totaling it up it's something like 2,300 days. We're talking $23,400 or something. I mean that's – and that's not counting the present year." (R. at 001646:1214). Later during closing argument, the trial court stated that "the only testimony I have is that from '96 on the gate was locked. I know from having supervised this case for a little while that there was a period of time by consent when the gate wasn't locked and then it was locked again. I don't know. But none of that testimony was presented at trial, so let's stick to the evidence that I heard at trial." (R. at 001646:1219).

Furthermore, there was additional evidence in the record, such as a letter from Randy Butler to former Utah County Commissioner Gary L. Herbert, dated December 9,

2002, in which Mr. Butler set forth with reasonable precision the amount of days that he left the gate unlocked. (R. at 001647: Plaintiff's Exhibit No. 4). In that letter, Mr. Butler states that "in October of 2001, we agreed to allow access for the hunts. That fall Utah County put up a sign on the gate that stated it was private property to the U.S. Forest Service Land. We left the gate unlocked for approximately 30 days. . . . We locked the gate again until August 20, 2002 without incident. . . . Consequently, I locked the gate on October 24, 2002, and as of December 1, 2002, there has not been any problem." (R. at 001647: Plaintiff's Exhibit No. 4).

The only evidence to the contrary offered by Cross-Appellees was the "Notice of Public Hearing" and a sign placed on the gate across the Road by Utah County. For a more detailed discussion of these two items, please see Section IX of Utah County's initial brief. Cross-Appellees point to no other evidence to the contrary because there is none. The trial court even so commented when it said "the only testimony I have is that from '96 on the gate was locked. I know from having supervised this case for a little while that there was a period of time by consent when the gate wasn't locked and then it was locked again. I don't know. But none of that testimony was presented at trial, so let's stick to the evidence that I heard at trial." (R. at 001646:1219).

Therefore, after considering that evidence, the Appellate Court should reverse the decision of the trial court and Utah County should be granted judgment in the amount of

$10 for each day the gate remained within the right-of-way after notice was complete from July 29, 1997 to August 16, 2004 [the date of the Findings of Fact, Conclusions of Law, and Order] for a total of 2,754 days and $25,740.00 or in the alternative subtract 94 days for the time the gate was unlocked in October 2001, and from August 20, 2002 to October 24, 2002 and adjust the Judgment accordingly.

CONCLUSION

Based on Utah County's initial brief and the forgoing, Utah County respectfully requests:

1. That the Court uphold the decision of the trial court which determined that the Bennie Creek Road is a public thoroughfare and dismiss Appellants' appeal.

2. That the Court reverse the trial court and order judgment in favor of Utah County and against Defendants Butler for a penalty of $10.00 for each day that the gate remained in the Bennie Creek Road right of way after service of the Notice to remove the same, or in the alternative, for $10.00 for each day the gate remained locked across the Bennie Creek Road after service of the Notice to remove the same.

3. For Plaintiff's costs on appeal and cross appeal.

4. For such further relief as is just and equitable in the premises.

RESPECTFULLY SUBMITTED this 29th day of March, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I hand delivered a true and correct copy of the foregoing **Reply Brief of Cross Appellant Utah County**, on this 29th day of March, 2006, to the following:

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